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JUN 4 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1602

E. I. DUPONT DE NEMOURS & COMPANY and PPG INDUSTRIES, INC., *Petitioners*,

vs.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

No. 75-1612

ETHYL CORPORATION, *Petitioner*,

vs.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

No. 75-1613

NALCO CHEMICAL COMPANY, *Petitioner*,

vs.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

No. 75-1614

NATIONAL PETROLEUM REFINERS ASSOCIATION, ASHLAND OIL, INC., CLARK OIL & REFINING CORPORATION, KERR-MCGEE CORPORATION, MOHAWK PETROLEUM CORPORATION, INC., *Petitioners*,

vs.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AS AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit

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This motion of Pacific Legal Foundation (PLF) for leave to file the annexed brief *amicus curiae* in

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support of petitions for writ of certiorari is respectfully made pursuant to Rule 42 of the Supreme Court Rules. Consent to the filing of this brief has been obtained from counsel for all parties with the exception of the Solicitor General, counsel for respondent Environmental Protection Agency, and such consents have been lodged with the clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens. Twelve of the seventeen-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Board has authorized the filing of a brief *amicus curiae* in support of petitions for writ of certiorari in these cases.

PLF considers these cases to be of special significance in that they raise the issue of the proper scope of review of administrative agency decisions and procedures. Particularly, the decision of the court of appeals for which review is sought raises the question whether legislative policy decisions of an administrative agency are exempt from the rigorous review to which findings of fact by administrative agencies are subjected.

As a public interest law foundation, PLF frequently finds itself engaged in litigation with federal administrative agencies, and particularly the Environ-

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mental Protection Agency, in matters concerning such policy decisions. Thus the scope of review of these decisions is extremely important to PLF.

For this reason, Pacific Legal Foundation requests that this motion to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

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INTEREST OF AMICUS

The interest of *amicus* is set out in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion *en banc* of the United States Court of Appeals for the District of Columbia Circuit of March 19, 1976, is unofficially reported at 8 ERC 1785.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

In this brief *amicus curiae,* Pacific Legal Foundation (PLF) proposes to address only the issue of the scope of review utilized below by the court of appeals. *Amicus* believes that the concept of scope of review of administrative decisions there adopted requires review by this Court under the considerations governing review on certiorari set forth in Supreme Court Rule 19(b) in that:

1. Such concept is in conflict with the decision of other courts of appeals on the same matter;

2. Scope of review is an important question of federal law which has been decided by the court of appeals in a way which is in conflict with applicable decisions of this Court; and

3. The decision of the court of appeals has so far sanctioned a departure from the accepted and usual course of proceedings by an administrative agency

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as to call for the exercise of this Court's power of supervision.

I

LEGISLATIVE POLICY QUESTIONS REQUIRE MORE RATHER THAN LESS RIGOROUS SCRUTINY BY THE COURTS

The majority below (Maj. Op. at 46) has in this case adopted a special rule for review of questions believed by the court to be matters of legislative policy. Thus, the court found in the applicable statute "a recognition by Congress that a determination of endangerment to public health is necessarily a question of policy that is to be based on an assessment of risks and that should not be bound by either the procedural or the substantive rigor proper for questions of fact." Maj. Op. at 46.

The court noted that the Administrator must be accorded "a flexibility that recognizes the special judicial interest in favor of protection of the health and welfare of people, even in areas where certainty does not exist. *Environmental Defense Fund, Inc. v. Ruckelshaus,* 439 F.2d 584, 598 (D.C. Cir. 1971)." Maj. Op. at 46.

This citation is puzzling in that the referenced case espouses a view diametrically opposed to that of the opinion at issue. There the court spoke of a "new era" in judicial review of agency action. *Ruckelshaus, supra* at 597. The court reasoned that since courts were increasingly asked to review "administrative action that touches on fundamental interests in life, health and liberty" there was a dire necessity to

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protect these interests from "administrative arbitrariness." To do this, strict judicial scrutiny must be applied. *Id.* at 598. That court stated:

> "For judicial review alone can correct only the most egregious abuses. Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. [Footnote omitted.] Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible. [Footnote omitted.] Rules and regulations should be freely formulated by administrators, and revised when necessary. [Footnote omitted.] Discretionary decisions should more often be supported with findings of fact and reasoned opinions. [Footnote omitted.] When administrators provide a framework for principled decisionmaking, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process, and to improve the quality of judicial review in those cases where judicial review is sought." *Id.*

In the instant case, the court disregards this admonition and finds that "if the statute accords the regulator flexibility to assess risks and make essentially legislative policy judgments, as we believe it does, preventive regulation based on conflicting and inconclusive evidence may be sustained." Maj. Op. at 51. The majority found therefore that "[w]here a statute is precautionary in nature [footnote omitted], the evidence is difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowl-

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edge, the regulations designed to protect the public health, and the decision that of an expert administrator, we will not demand rigorous step-by-step proof of cause and effect." Maj. Op. at 53-54.

This new doctrine is at odds not only with the mandate of *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971), to engage in a "searching and substantial inquiry." *Id.* at 415. It is also glaringly inconsistent with this Court's decisions concerning delegation of legislative policy making functions to administrative agencies.

Legislative policy making is a Congressional function. Article I, Section 1, of the United States Constitution provides that "[*a*]*ll* legislative powers herein granted shall be vested in a Congress of the United States." (Emphasis added.) Because of the language of this section, it has been the traditional rule in federal law that Congress cannot delegate its law-making power to any other authority or body. *United States v. Shreveport Grain & Elevator Co.,* 287 U.S. 77 (1932); *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan,* 293 U.S. 388 (1935).

The Clean Air Act authorizes the Administrator to prohibit, control, or regulate a fuel or fuel additive if "the emission products will endanger the public health or welfare. . . ." 42 U.S.C. § 1857F-6C(c)(1)(A).

Since *United States v. Rock Royal Co-Op,* 307 U.S. 533 (1938), the federal rule on delegation of powers has been that:

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> "each enactment must be considered to determine whether it states the purpose which the Congress seeks to accomplish and the standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits. . . ." 307 U.S. at 574.

As one authority has restated the rule:

> "In other words, the delegator cannot just delegate and let the delegatee go off on a legal and political bender; the delegatee must be curbed, else his power would be unlimited. This curb is a requirement of the Constitution, as judicially interpreted in each case, so that every delegation must contain standards as limitations. These standards are for the purpose, as Chief Justice Warren has stated in another connection, of having the force of law, not the law of force, apply." M. Forkosch, *Administrative Law,* 103-104 (1956).

It is clear that the decisions of this Court require that in any delegation of any legislative power—and certainly in the area of legislative policy making—the courts must give such delegation the strictest of scrutiny. Thus, the court of appeals' ruling that preventive regulation based on conflicting and inconclusive evidence may be sustained if a statute may be interpreted as according the regulator flexibility to assess risks and make essentially legislative policy judgments (Maj. Op. at 51) without being subjected to either the procedural or substantive rigor proper for questions of fact (Maj. Op. at 46) is in conflict with the applicable decisions of this Court concerning

review of delegated powers and should therefore be reviewed by this Court.

II

THE STANDARD OF REVIEW USED IN THIS CASE CONFLICTS WITH THE STANDARD SET BY THIS COURT AND FOLLOWED IN OTHER CIRCUITS

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-416 (1971), prescribes the standard of review under the Administrative Procedure Act. There this Court noted that 5 U.S.C. § 706 dictates a "substantial inquiry," a "thorough, probing, in-depth review." The court must first decide whether the Administrator acted within the scope of his authority. Then the court must go on to determine whether the choice made was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." To do this the court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." The reviewing court is *specifically instructed* to make an "inquiry into the facts." *Id.*

While the opinion of the court of appeals accepts these requirements in theory (Maj. Op. at 69-71), it does not follow them in practice in holding that the standard of review is narrower in cases of legislative policy making than it would be in others. Maj. Op. at 4.

The concurring opinion of Judges Bazelon and McGowan, whose votes are necessary to the majority, says

explicitly what the court seems to accept implicitly. This opinion is based on the premise that courts should not inquire into the technical details of administrative decisions. (Bazelon at 1.) This was not the approach of the District of Columbia Circuit in *International Harvester v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973). It has also been explicitly rejected by the First Circuit in *South Terminal Corp. v. Environmental Protection Agcy.*, 504 F.2d 646 (1st Cir. 1974).

The Eighth Circuit in *Union Electric Co. v. Environmental Pro. Agcy.*, 515 F.2d 206, 214 (8th Cir. 1975), *appeal pending*, states that the one principle upon which Clean Air Act cases are in agreement is that the standard for review of agency decisions is the arbitrary and capricious standard.

The Fifth Circuit in *State of Texas v. Environmental Protection Agency*, 499 F.2d 289 (5th Cir. 1974), *appeal pending*, heard a state challenge to the Environmental Protection Agency's (EPA) rejection of its plan. It held the standard of review was that announced in *Overton Park, supra*, and went on to say:

> "In applying this standard, our review must be based not only upon the agency's explanation of 'its course of inquiry, its analysis and reasoning,' [citation omitted] but also upon the full record before the agency [citation omitted]. Only by our own study of the record can we resolve the factual disputes between the parties, much less hope to 'engage in a substantial inquiry' into the agency's action." *Id.* at 297.

In *South Terminal Corp., supra*, the First Circuit Court of Appeals reviewed an EPA regional air qual-

ity control plan made in place of a state plan. Again, the court applied *Overton Park* standards. The court emphasized the "clear error of judgment" language and stressed the need for a "searching and careful" review to assure it "that the Agency's *technical conclusions no less than others* are founded on supportable data and methodology and meet minimal standards of rationality." *Id.* at 655. Emphasis added.

The court also upheld the arbitrary and capricious standard for review of the controls selected by EPA, but said it must bear in mind that Congress has given EPA, not the courts, the discretion to choose among alternative strategies. This may be similar to the type of "policy" decision discussed by the majority here. But in *South Terminal* the court insisted that the technical determination upon which the policy is based be strictly reviewed and explained. That court did not accept some of EPA's technical determinations in that case, but went on to review the implementation plan controls. In reviewing a regulation putting a freeze on new parking spaces, the court indicated:

> "We cannot say that such a freeze is arbitrary and capricious *assuming EPA is able to support by credible data* its position as to the magnitude of the need for carbon monoxide emission reductions . . . ." *Id.* at 671. Emphasis added.

The majority in the case at bar appeared reluctant to question whether there is credible data to support

the decision. While the court cannot substitute its judgment for that of the Agency, the reviewing court must require the Agency to demonstrate to the court that its decision is based on credible data. *Overton Park, supra* at 416.

In *Appalachian Power Co. v. Environmental Pro. Agcy.*, 477 F.2d 495 (4th Cir. 1973), petitioners sought review of EPA approval of a state plan for implementation of federal ambient air quality standards. The Administrator argued that the scope of review should be limited solely to questioning whether a state hearing was held and whether the mathematical determination that the rational standards will be achieved under the state plans were arbitrary and capricious. He contended these were the only things which he considered in his action. The court did not accept this argument and reasoned that the Administrator had considered much more than these factors and that it needed to engage in a "substantial inquiry" into all of his considerations to assure itself that all relevant factors had been considered by the Agency. The court therefore demanded the "full record" before the Administrator when he made his decision. The emphasis of the "full record" in that case and others indicates that the court must examine *all* the bases for the agency decisions whether termed technical or policy.

In *Friends of the Earth v. U.S. Environmental Pro. Agcy.*, 499 F.2d 1118 (2d Cir. 1974), the Second Circuit Court of Appeals reviewed EPA's approval of certain aspects of New York's clean air implemen-

tation plan. The court was primarily concerned with whether the Administrator was correct in his factual determinations. Again that court reiterated the *Overton Park* standard that an inquiry into the facts should be "searching and careful." It indicated that if the record does not reveal the basis of his determination, the court can ask the Administrator for a further explanation and if the findings are not sustained by the record the court can vacate the decision. *Id.* at 1123. While this inquiry of the court was limited to a factual inquiry, it emphasizes that the Administrator must present a full factual basis for his decision. Again, in this case the court recognizes that while it cannot substitute its judgment for that of the Administrator, it must ask whether or not he had a basis for the decision he made.

The "arbitrary and capricious" standard is the one which other courts of appeals have stressed. All these cases require a full record indicating all factors considered and a thorough explanation of why the decision was made. These courts also stress that all relevant factors be considered in the decision. This indicates that even if a decision is termed one of "policy" it must be supported by facts which the court can review to ascertain if they were properly considered or determined. While a court cannot substitute its decision for the Agency's, it can require the Agency to substantiate its decision at every step. The scope of review in these courts, then, substantially conflicts with the scope of review espoused by the majority here.

CONCLUSION

Scope of review of administrative agency decisions and procedures is an important question of federal law. Because the standard adopted by the majority in the case at bar conflicts with the standard specified by this Court and implemented by other courts of appeals, Pacific Legal Foundation, as *amicus curiae,* urges that the petitions for certiorari be granted.

Respectfully submitted,

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